No. 326

IN THE

Supreme Court of the United States

October Term, 1947

JOHANNA M. KIND and HERMANN H. KIND, as Trustees under the Last Will and Testament of HERMANN KIND, Deceased,

Cross-Petitioners,

v.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,

Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS IN REPLY.

ARNOLD T. KOCH,
Counsel for Cross-Petitioners, Johanna M. Kind and Hermann H. Kind, as Trustees under the Last Will and Testament of Hermann Kind, Deceased.

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BRIEF FOR PETITIONERS IN REPLY.

The evidence referred to on page 4 of his opposing brief as supporting the claim of the Circuit Court of Appeals that the transfer of the stock was fictitious, typifies the peculiar idea the defendant has as to the quantum of proof he needs to wrest property from an American estate, for the ultimate possible benefit of a former enemy alien.

In claiming that the contracting parties did not mean what they were doing in entering into the agreement of October 24th—November 6, 1939, the respondent refers to (1) Iwersen's statement of September 26, 1939 to Voss, an official of Graef & Schmidt, Inc., and not an agent of the Estate, that he, Iwersen, assured the German Foreign Exchange Control that "at the end of the war" the estate was to make "a fair settlement of accounts" (Ex. CC-1, R. 274); and (2) Iwersen's letter of September 13, 1939 to the

German Supervisor of Finance that "the Estate of Hermann Kind will submit an exact accounting; in other words that the interests of the firm of J. A. Henckels, Solingen, and thus the interests of the German Reich, as regards devisen will be safeguarded in every respect" (Ex. BB-1, R. 270).

Obviously the German nation, at the threshold of a new war, was anxious that no German assets located in foreign countries be allowed to disappear or be sold without fair consideration, and Iwersen's position at that time—an American located in Germany—was probably not an enviable one, was viewed with suspicion by the Germans, and accounted for his profuseness in assuring the Germans that no German assets would be dissipated. However, his assurances, quoted above, were entirely innocuous, and in no way afford a basis for any cloaking scheme.

At the outbreak of the war the assets of the German firm consisted of a debt of Graef & Schmidt, Inc. of $134,000, and an equity in the stock of that corporation which had been pledged with the Estate. All credible testimony showed that such equity at that time was negligible, if not worthless (R. 39, 40, 142). Accordingly the only matter of substance as to which Iwersen could possibly have tried to satisfy the German authorities was the assurance that if the Estate took over the stock and then controlled and operated the corporation it would account for the substantial moneys that corporation owed Henckels K. G. Certainly there was nothing sinister in such an assurance.

Another display of suspicion running rampant is the sinister implication given the assurance found by the respondent (p. 6) and the Circuit Court of Appeals (R. 430-431) in what to us is perfectly harmless, namely, the statement by Voss to Iwersen, and endorsed by Hermann Kind,

"that everything is being done to safeguard the interest of the firm Henckels" (Ex. 1, R. 318).

The record shows that up to the end of 1939 Kind had been working merely as a salesman of Graef & Schmidt, Inc. (R. 33), whereas Voss, a much older man, had been in an executive position second only to that of Iwersen (R. 131). Accordingly, Iwersen had some concern as to how those two parties would "pull together" when the younger, Kind, was elevated to the position of presidency. This concern Iwersen voiced to Voss in a letter of November 13, 1939 (Ex. JJJ-1, R. 308), and to allay his fears, Voss replied on November 28, 1939, in the letter referred to by respondent, that the "best harmony exists between us" and to emphasize this fact he had Kind sign the letter as well (Exs. I, J, R. 318-319). And in so far as possible dissension might also worry the largest creditor, Henckels K. G., the writer also made the assurance, which to the respondent seems so sinister, "that everything is being done to safeguard the interest of the firm Henckels."

Exception is also taken to the remark on page 6 of respondent's brief that "Iwersen thereupon wrote Kind that he would no longer insist on a writing, since the assurance of the estate's willingness was sufficient (Ex. RR-1, R. 375, R. 434)." As we read Iwersen's letter we see nothing but disappointment therein over the fact that he did not get the assurance he wanted from the Estate, as to a surplus. Subsequently he admitted to the German authorities that "the Estate has not expressly confirmed this obligation"; that at best he had a "Gentlemen's Agreement", based solely on information he had received from "our New York manager" (Voss) (Ex. VV-1, R. 370). This was denied by Voss (R. 146). In any event Voss had no authority to speak for the Estate (R. 138).

The Importance of This Case.

The cases cited on page 8 of respondent's brief merely state the proposition that, generally, this Court will not grant certiorari to review evidence and discuss facts. Petitioners, however, urge that their application involves much more than a request to review evidence. It involves the serious question of what kind of treatment is to be accorded to United States citizens by the respondent and by the courts in connection with their efforts to recover their property vested under the Trading With The Enemy Act. Is the purpose of that Act merely to protect our nation in time of war by seizing property which might be used against it during the war, or is the purpose to punish and wreak vengeance on United States citizens if they were guilty of conduct which might possibly be capable of unfavorable construction? Shall these persons be entitled to the application of the principles of evidence applicable in the ordinary civil case, or are they to be presumed guilty because they happened to transact ordinary commercial matters with people who subsequently became their foes? It is clear that until this Court speaks on the subject the respondent will believe that he may confront plaintiffs with documents, hearsay and other types of evidence which under no conceivable basis would be admitted in any other kind of a case.

In the case at bar the defendant offered in evidence documents addressed by one German official to another, or by Iwersen, or Henckels K. G., to German officials. Plaintiffs knew nothing about those documents and never saw their contents until the trial herein (R. 107, 176) and yet the defendant did not hestitate to use them although they could not possibly have been binding on the plaintiffs. While the Trial Judge let them all in, he did subsequently declare in his decision that they were incompetent (R. 419). A typical

example of defendant's misconception of the extent to which he should go in trying to prevent recovery of property claimed by United States citizens, was his introduction of a release by the German Minister of Finance to other German officials at the outbreak of the war concerning the protection of German property abroad, and suggesting various devices to circumvent seizure (Ex. AAA-1, R. 259). The defendant in no way sought to show that any of the parties in this action, or that even Henckels K. G. or Iwersen, knew of the existence or contents of that document. Obviously the defendant, by introducing that document, hoped to create a presumption that any business deal subsequently entered into between an American civilian and a German civilian having to do with the transfer of an asset, was a sham and solely motivated by the above edict. Lest such tactics be repeated in the countless other seizure cases awaiting trial, a pronouncement by this Court that this type of case must be tried and decided in the same manner as any other civil case should have a salutary effect.

In this connection it should be noted that the Circuit Court of Appeals also evinced a peculiar attitude—or bias—in its treatment of the evidence. Under the liberal rulings of the trial judge, the defendant was able to introduce many letters to German officials which the Judge subsequently conceded were incompetent (R. 419). Only one offer of proof was rejected, and that was when the defendant offered to prove that when the testator, Hermann Kind, in 1920, bought stock of a predecessor corporation from the Alien Property Custodian, he testified that it was not his intention to convey or transfer the same to the former German owners (R. 53). Such evidence was clearly incompetent, irrelevant and immaterial, and in no way binding on what the trustees did 19 years later. The offer was designed solely to put the plaintiffs in a prejudicial light.

Inasmuch as the defendant's proffer on this point was denied, there was of course no need for the plaintiffs to introduce evidence on the question of whether or not the testator was relieved, subsequent to 1920, from any undertaking not to sell to Henckels K. G. the stock which the testator had purchased from the Alien Property Custodian. While the defendant excepted to the trial judge's ruling, he did not press his claim of error before the Circuit Court of Appeals. Nevertheless, the Appellate Court eagerly grasped this offer of proof and displayed its propensity for suspicion when it stated in a footnote: "Appellants offered to prove that, before the deceased made this purchase (through an intermediary) he had stated under oath to the Alien Property Custodian that he agreed not to sell it to any firm or corporation not a citizen of the United States" (R. 427) thereby inferentially condemning a dead person who was not able to defend himself, and whose representatives deemed it unnecessary to defend him because of the favorable ruling of the trial judge. Inasmuch as sometime before his death in 1928, he had sold some of the stock back to Henckels K. G., it is obvious that the Circuit Court of Appeals preferred to believe that the testator had committed some fraud against his country, and that this set some sort of a pattern for his widow and son to follow in their dealings with the Germans in 1939. To anyone viewing the proffer of proof with an unbiased mind, it must be obvious that if the "intention" alleged to have been expressed by the testator in 1920 was, in fact, a commitment not to resell to the Germans, such restriction must have been removed in the course of time, and certainly no later than the early part of 1928, when under the Settlement of War Claims Act of 1928, enacted March 10, 1928 (45 Stat. 254, 50 U. S. C. A. Appendix, sections 9, 10, 20 *et seq.*) Congress authorized the Alien Property Custodian himself to return seized property to former German owners.

Finally, inasmuch as it deemed it necessary to refer to the fact, the Circuit Court of Appeals evidently saw something sinister in the testator's having purchased the stock "through an intermediary". Yet, here again, calmer reflection would immediately have appreciated that since the testator himself was required to testify that the stock would not be retransferred to the Germans, certainly the Alien Property Custodian was not deceived by the use of an intermediary and considered the testator as the real purchaser.

In conclusion, lest the manner in which the Circuit Court of Appeals ignored the painstaking findings of the Trial Court and let suspicion be the basis of its revised findings, be taken as a pattern in the trial and determination of future cases of this type, we strongly urge the intervention of this Court by granting certiorari herein.

Respectfully submitted,

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